JD–36–06
Morris, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MORRIS HEALTHCARE & REHABILITATION CENTER, LLC, AND PRISM HEALTHCARE GROUP, INC., A SINGLE INTEGRATED ENTERPRISE AND/OR JOINT EMPLOYER

and Case 13—CA—42882

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL–CIO, ON BEHALF OF AFSCME LOCAL 3903

Richard S. Andrews, Esq., for the General Counsel.
John D. Jeske, Esq., of Chicago, Illinois, for the Respondent.
Melissa J. Auerbach, Esq. (Cornfeld and Feldman), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Chicago, Illinois, on February 6–7, 2006. The charge was filed September 7, 2005, an amended charge was filed November 15, 2005 and the complaint was issued November 18, 2005.[1] The complaint alleges that the Respondent, Morris Healthcare & Rehabilitation Center, LLC, and Prism Healthcare Group, Inc., a single integrated enterprise and/or joint employer,[2] failed to bargain in good faith with the Charging Party, the American Federation of State, County and Municipal Employees, Council 31, AFL–CIO, on behalf of AFSCME Local 3903 (the Union), in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally changing wages, hours, and terms and conditions of employees in a bargaining unit represented by the Union without giving the Union notice and an opportunity to bargain. The complaint also alleges that agents of the Respondent made statements to employees informing them that it would be futile to support the Union, in violation of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

[1] All dates are in 2005 unless otherwise indicated.

[2] The parties stipulated that Morris Healthcare & Rehabilitation Center, LLC, and Prism Healthcare Group, Inc. are a joint employer.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, operates a nursing home facility in Morris, Illinois (the nursing home), where, based on a projection of its operations since September 1, when it commenced operations, the Respondent will annually derive gross revenues in excess of $100,000. Furthermore, in conducting its operations since September 1, the Respondent purchased and received at its Morris facility goods valued in excess of $10,000 from other enterprises located within Illinois, each of whom received these goods directly from points outside Illinois. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Privatization of the Nursing Home

In May or June, the Grundy County Board of Supervisors (Grundy County Board) decided it no longer wished to operate the nursing home and prepared to transfer operations to a private entity. As part of that process, the Grundy County Board notified the Union, which represented most of the nursing home's employees, that it would solicit bids for a lease agreement to operate the nursing home. As a result, the Union requested and engaged in bargaining with Grundy County in June and July. In July, the Grundy County Board started negotiating with a group led by the nursing home's medical director, Dr. Peter Roumeliotis (the Roumeliotis Group). Negotiations languished, however, and the Grundy County Board rescinded its offer to the Roumeliotis Group on August 16. At the same meeting, it announced its intention to negotiate with Prism Healthcare Group, Inc. (Prism).[3] During the meeting, Kimberly Westercamp, Prism's chief operating officer, explained that Prism had been involved in discussions with the Grundy County Board for the past 6 months about different approaches for a takeover and was "very interested in working with the employees and the county." Prism and the Grundy County Board commenced lease negotiations on August 19. On the same day, the nursing home's management company (Revere Healthcare), the nursing home's administrator, and the director of nursing resigned. Later that day, a representative of the Illinois Department of Public Health arrived at the nursing home to monitor operations. As a result, the Grundy County Board asked Prism to immediately assume management of the nursing home's operations on an interim basis. Prism agreed.[4]

The Grundy County Board and Prism negotiated the terms of a transfer of the nursing home over the next several days. They were able to enter into a tentative agreement, subject to formal approval at the next Grundy County Board meeting. At its August 22 meeting, the Grundy County Board placed the proposed nursing home transfer on the agenda for public discussion. The Union's regional director, Joseph Bella, addressed the Board and spoke of his concern for the nursing home's residents and employees. Lewis Borsellino, Prism's chief executive officer, addressed those concerns. He explained that he wanted a smooth transition and planned to rehire most of the nursing home's staff, except for a few with absenteeism problems.[5] On the

[3] The relevant background is undisputed. (Tr. 28–31, 255–256, 280; GC Exh. 22.)

[4] This finding is based on the credible and unrefuted testimony of Kimberly Westercamp, Prism's chief operating officer. (Tr. 293–295.)

[5] I based this finding on the credible testimony of Pamela Loveland and Cynthia Farmer,

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same day, the Grundy County Board approved an operations transfer agreement turning over the operation of the nursing home to the Respondent. As part of the transfer, the Respondent would lease the facility and assume the operation of the nursing home, effective September 1. The Respondent would also immediately take over management of the nursing home. Borsellino signed the lease agreement as owner of the Respondent.[6] The lease agreement included, in pertinent part, an addendum stating the Respondent's obligation to defer to incumbent staff in hiring:

> 1.1 Senior Management
> Lessee acknowledges that Lessee shall employ a policy to give deference to existing staff members prior to seeking outside staff and that in the event that all candidate qualifications being taken as equal, the Lessee shall allow the residency of the candidate in the County of Grundy to be become the determining factor for employment of the candidate.
>
> 1.2 Medical Director
> Lessee acknowledges that Lessee shall employ a policy to give deference to the position of Medical Director wherein in the event that all candidate qualifications being taken as equal, the Lessee shall allow the residency of the candidate in the County of Grundy to become the determining factor for employment of the candidate as Medical Director. Lessee further acknowledges its intention to offer the position of Medical Director to Dr. Peter Roumeliotis on commercially reasonable terms as would be offered to a Medical Director with his qualifications and skills.
>
> 1.3 Prior Staff and Employees
> Lessee acknowledges that Lessee shall employ a policy to give deference to existing staff members prior to seeking outside staff and that in the event that all candidate qualifications being taken as equal, the Lessee shall allow the residency of the candidate in the County of Grundy to become the determining factor for employment of the candidate.[7]

In addition, during a local Sunday morning radio show hosted in August by Grundy County Board member Dick Steele, Borsellino reiterated that there would be a smooth transition, everything would remain the same, and most staff would be rehired, except for a few employees with absenteeism problems. He also said that he was not antiunion, but felt that unions gave employees the opportunity to have excessive call-offs.[8]

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who attended the Board meetings in August. (Tr. 60–61, 93, 154,198–206.)

[6] Borsellino agreed during his testimony that he always intended to live up that agreement. (Tr. 263; GC Exh. 10.) He also conceded that, at the Grundy County Board meeting, he was "in the hot seat" and needed to have a happy workforce. (Tr. 287.)

[7] GC Exh. 10, p. 617.

[8] This finding is based on the credible testimony of Cynthia Farmer and Lisa Foland. (Tr. 164, 241–242.) Borsellino conceded doing the radio interview, but provided merely a summary of the interview and a general denial that he did not make any promises regarding the hiring process. That general denial sidestepped and was, therefore, insufficient to refute the specific testimony of Farmer and Foland. (Tr. 283–284.)

B. The Employee Hiring Process

On August 22, Westercamp interviewed the nursing home's department heads. With the exception of the director of nursing, who had resigned, Westercamp hired all of the remaining supervisors and asked that they proceed to interview and hire employees. The applications were then provided to nursing home employees from August 22 to 24. At that point, however, Westercamp had not yet determined wages, fringe benefits, or working conditions and the application form was silent on those points.

Between August 22 and 31, the nursing home's employees submitted employment applications and were interviewed by department heads, as well as Alma Woods, Prism's nursing director at the Amboy Nursing Rehabilitation Center (Amboy nursing home). Westercamp brought in Woods to interview the applicants for nursing department positions.[9] The rehired supervisors included Lisa Joneson, the dietary department manager, John Spiewak, the maintenance, housekeeping, and laundry department (maintenance department) manager, and Barbara Hoffman, the activities director.

At no time during the application and interview stages were employees specifically informed about wages, benefits, or other terms of employment.[10] Some employees were, however, informed of their wage rates prior to attending orientation. Joneson's dietary department employees inquired about the wage rate during their interviews. As a result, Joneson spoke with Westercamp about applicable wage rates on August 26. Westercamp provided Joneson with the information and Joneson informed her rehired employees the next time she saw them at work—in any event, prior to the orientation sessions. Hoffman was also informed by Westercamp about the applicable wage rates for activities department employees. She passed that information on to the rehired employees prior to the orientation sessions.[11] In addition, Spiewak notified maintenance department employees of their applicable wage rates prior to September 1.[12]

Nursing department employees, however, did not have a permanent supervisor as of September 1. As a result, they were not informed of their wage rates until they received their paychecks on September 21.[13] Several CNA's did try to obtain wage information before then,

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[9] This finding is based on the credible and fairly consistent testimony of Loveland and Westercamp. (Tr. 61–62, 297–299, 323; GC Exh. 9.)

[10] The testimony of the witnesses called by the General Counsel and the Respondent, including Westercamp, was fairly consistent on this point. (Tr. 70, 167, 217, 244-245, 298, 301-302, 310, 349, 363, 365–366, 368; R. Exh. 2 .)

[11] I base this finding on the testimony of credible and unrefuted testimony of Westercamp, Joneson, and Hoffman, as it pertains to employees in the dietary and activities departments. (Tr. 303, 349–350, 357, 359.)

[12] Spiewak also provided credible and unrefuted testimony regarding the dissemination of wage rate information to maintenance department employees. While it is clear that he told them their wage rates prior to September 1, it is unclear whether he told them prior to their attendance at orientation. (Tr. 363, 366.)

[13] I base this finding on the credible testimony of Loveland, Hoxie, Foland, and Farmer. (Tr. 76–78, 128, 167, 244.) Teresa Averhart, a nursing supervisor, initially testified that employees learned about their wages before or at the time they were hired. However, her evasive testimony about a pending promotion made her less than credible. In any event, she conceded on cross-examination that nursing staff did not learn their wage rates until after orientation. (Tr. 369–378.) As it turned out, according to Borsellino, everyone who was rehired continued to

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but were unsuccessful. On August 27 or 28, Jessica Hoxie and other CNA's approached Woods. Hoxie asked Woods about the applicable wage rate, but Woods did not know. Hoxie then asked her about benefits. Woods explained that the Amboy nursing home had good benefits. Hoxie then asked Woods whether Prism had its own staff. Woods replied that when Prism took over the Amboy nursing home, it kept 80 percent of the staff. Hoxie then asked Woods if they were to come to work on September 1. Woods said "yes."[14]

While the Respondent did not convey any wage or benefit-related information to employees during the application and interview stages, several supervisors did inform several CNA's about their views of the Union. During her interview with Woods on August 22, Lisa Foland, current union president, was asked whether "it be a problem union or non-union." Foland replied, "no."[15] During her interview with Woods sometime prior to August 31, Pamela Loveland was told "this is a non-union place." Woods then asked Loveland, who was then the president of the Union, if that would bother her. Loveland, motivated by the desire to be rehired, responded that it would not bother her.[16] Around the same time, and after being interviewed by Woods on August 23 or 24, Denise Sereno spoke with Suzanne Day, the nursing home's former social worker and newly appointed administrator.[17] Day told her "that there couldn't possibly be a union because it only represents county employees" and that "for private employees it's a different matter."[18]

By August 31, 94 of the 96 nursing home's bargaining unit-level employees applied for employment by Prism. Of the 94 that applied, 90 were offered positions. Eighty of the 90 persons offered employment accepted the position that was offered. The rehired employees included Dr. Roumeliotis.[19] On August 31, after completing the interviewing and hiring of incumbent nursing home staff, the Respondent then placed employment advertisements in newspapers.[20]

C. The Orientation Sessions

All rehired employees were directed to attend orientation meetings on August 29, 30, and 31. The meetings were conducted by Nicole Minucciani, the Respondent's human resources manager. Minucciani read the entire employee handbook, which included, among other things, sections on employee classifications, hours of work, overtime, shifts, meal times and breaks, performance evaluations and salary increases, sick pay, bereavement leave, family leave, leave of absence, paid holidays, paid vacations, and health insurance. A health benefits

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receive the same wage rate and some received raises. (Tr. 288.)

[14] This finding is based on Hoxie's credible and unrefuted testimony. (Tr. 123–125.)

[15] This finding is based on Foland's credible and unrefuted testimony. (Tr. 240, 244; GC Exh. 20.)

[16] This finding is based on Loveland's credible and unrefuted testimony, as neither Minor nor Woods testified. (Tr. 64–71; GC Exh. 12.)

[17] The parties stipulated that, at all relevant times, Minor and Day acted as statutory supervisors, while Wood acted as a statutory agent of the Respondent. (Jt. Exh. 3.)

[18] This finding is based on Sereno's credible and unrefuted testimony (Tr. 220, 225–226, 253–254.)

[19] Westercamp speculated that approximately 85 nursing home employees were rehired as of September 1, but a tally submitted by Grundy County to the Union, providing information as of August 31, was more reliable. (Tr. 264, 323; GC Exh. 5.)

[20] Borsellino conceded that this was the earliest date that the Respondent placed newspaper advertisements (Tr. 270–271; GC Exh. 23.)

specialist also explained the terms of health and dental coverage. The employees acknowledged receipt of the handbook, as well as a harassment policy, a call-off policy, a resident handling policy, resident abuse and neglect acknowledgement, a drug screening policy, and an acknowledgment that the "first paycheck will be distributed once all information necessary to complete employee file is completed and checked by the front office." Employees were also required to choose either a benefit option or a no-benefit option. The benefit option included the availability of health insurance, paid vacation, paid sick time, paid holiday time, and bereavement pay. The no-benefit option included the availability of health insurance only.[21]

Each orientation session lasted up to an hour. The employee handbook reflected the following changes in employees' benefits and working conditions: (1) eliminated the evening and weekend shift differentials; (2) changed insurance coverage and applicable copayments and premiums; (3) reduced the number of paid holidays from 13 to 7; (4) changed the number and accrual rate of sick days; (5) reduced breaktime from two 15-minute breaks to two 10-minute breaks; (6) eliminated employee seniority; (7) reduced vacation amounts and accrual rates; (8) changed shift and days-off schedules; (8) changed a paid 30-minute meal period to an unpaid meal period; (9) changed the hourly wages of some employees; (10) eliminated personal leave days; (11) eliminated longevity pay; (12) eliminated training pay; (13) eliminated temporary assignment pay; (14) eliminated filling of vacancy and promotional rights; (15) eliminated layoff and recall rights; (16) and eliminated and changed disciplinary procedure and just cause rights. The affected terms and conditions of employment were set forth in Articles 7-11 and 16-24 of Grundy County's collective-bargaining agreement (CBA) with the Union.[22]

D. Negotiations with the Union

Effective September 1, the Respondent leased the business of the nursing home and since then has continued to operate the business in basically unchanged form and has hired as a majority of its employees individuals who were previously employees of the nursing home.[23]

Prior to September 1, the Union represented most of the nursing home's employees pursuant to its CBA with Grundy County. The CBA contained the terms and conditions of employment for the employees in the bargaining unit. It defined included and excluded employees as follows:

> Included:
> Licensed Practical Nurse, Certified Nurse Aide or Nurse Aide, Dietary Aide, Cook, Activity Aide, Laundry, Housekeeper, Maintenance Worker, Psych./Soc. Aide, Runner and Support Service Workers.
>
> Excluded:
> Registered Nurse (DON, ADON and Clinical Manager), Social Worker, Kitchen Manager, Office Manager, Office Clerical (Receptionist/Administrative Secretary), Ward Clerk,

[21] There was no dispute between Minucciani and the employees who testified about the meeting—Loveland, Hoxie, and Sereno—regarding the information conveyed. (Tr. 75, 130–131, 218–219, 246–247, 330; GC Exhs. 8, 13, 16, 19, 21; R. Exh. 1.)

[22] The changes in these terms and conditions are established in three respects: (1) from a comparison of the CBA and the Respondent's employee handbook (GC Exhs. 2, 8); (2) the credible testimony of Loveland, Hoxie, Sereno, and Foland (Tr. 84–87, 141–142, 229, 249); and (3) the Respondent's concession in its brief. (R. Br. at 5–6.)

[23] Jt. Exh. 2.

Volunteer Coordinator, Scheduler, Activity Director, and all other managerial, supervisory, and confidential employees, as defined by the Act.[24]

On August 29, the Union's regional director, Joseph Bella, sent a letter by facsimile and certified mail to Borsellino requesting that the Respondent recognize the Union as the bargaining representative of the nursing home's employees and demanded to bargain:

> By this letter, AFSCME Council 31 hereby requests that Morris Health Care & Rehabilitation Center (Prism Health Care Group, Inc.) formally recognize AFCSME Council 31 as the exclusive representative of its employees effective as of the time and date that Prism becomes the lessee of the Grundy County Home (It is the Union's understanding that the effective time and date is 12:00 a.m., September 1, 2005). AFSCME Council 31 demands to bargain with Morris Health Care and Rehabilitation Center on all mandatory subjects of bargaining, including, but not limited to wages, hours and working conditions, and issues of impact during the transition phase.
>
> Morris Health Care & Rehabilitation Center and Prism are hereby notified that all wages, hours and working conditions must be held to status quo ante (status quo as of August 30, 2005) during the bargaining process and until the bargaining process is concluded. Changes in wages, hours of work and working conditions are done at the employer's peril. The Union will aggressively pursue back wages and back payments of benefits and other damages as remedy should the employer change the status quo prior to the conclusion of bargaining.
>
> Under the National Labor Relations Act, Morris Healthcare & Rehabilitation Center, LLC and Prism Health Care Group, Inc. is a "successor employer." Under the National Labor Relations Board's successorship doctrine, if a new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from its predecessor, the bargaining obligation of section 8(a)(5) of the National Labor Relations Act to negotiate with the majority is activated. *See Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 37 (1987); *NLRB v. Burns Int'l Sec. Servs.,* 406 U.S. 272, 278–79 (1972); *NLRB v. Joe B. Foods, Inc.,* 953 F.2d 287, 292 (7th Cir. 1992); *see also* 29 U.S.C. sec. 158(a)(5).
>
> Regarding the instant case, where the successor employer is a private employer and the previous employer is a public employer and the Union has been previously certified under the Illinois Labor Relations Act, the United States Court of Appeals for the Seventh Circuit (Nos. 96–3594 & 96–3922, *The Lincoln Park Zoological Society v. NLRB and Public Service Employees Union, Local 46*), affirmed the successor employer's obligation to recognize the Union as the exclusive representative and to bargain with it.
>
> The Union is available to begin bargaining on immediate impact issues and on a collective bargaining agreement on the following dates: August 31, September 2, 6, 8, 12, 13 and 14, 2005. Please contact me so that we may schedule sessions.
>
> If you have any questions, you can contact me at 312-641-6060 x 4374. Thank you in advance for your cooperation.[25]

[24] The provision referred to the Illinois Labor Relations Act.

[25] GC Exh. 4.

On August 31, Bella sent another letter to Borsellino, again by facsimile and certified mail, regarding the Union's pending charges against Grundy County:

> Pursuant to the National Labor Relations Act and NLRB decisions regarding obligations of successor employers, AFSCME Council 31 hereby informs you that the Union has two unfair labor practice charges pending that have been filed against the Grundy County Home. Under "successorship doctrine" case law under the National Labor Relations Act, a successor employer is liable for settlement and remedy in such cases.
>
> I have enclosed copies of the charges the Union has filed against the County Home. If you have any questions concerning these charges, I can be reached at 312-641-6060 x 4374.[26]

On September 6, the Respondent's attorney, John Jeske, Esq., responded to Bella's letters in writing. He agreed to meet to bargain, but disagreed with the Union's view regarding the Respondent's successorship liability:

> Prism Health Care Group, Inc. ("Prism") has hired my firm to represent it in all labor and employment matters. As you are aware, Prism is now operating the entity commonly known as the Grundy County Home. At this point in time, it appears to Prism that a significant portion of the employees hired by Prism were represented by your labor organization. Based upon our current knowledge of the employee's desires, we will agree to meet with you and bargain over the terms and conditions of employment for Prism's Grundy County Home employees.
>
> Be advised that I disagree with your legal conclusions regarding successorship liability and Prism's exposure concerning alleged unfair labor practices of Grundy County.
>
> Please direct all future correspondence and communication through my office. This letter also confirms the face to face meeting scheduled for Tuesday at 9:00 a.m. at the Oak Brook offices of Prism Health Care Group, Inc.[27]

Sometime between August 31 and September 6, Bella received a copy of the employee handbook from an employee who attended one of the orientation sessions, Prior to that time, the Union did not receive any information from the Respondent regarding the terms or conditions of employment of the nursing home employees after it assumed operations on September 1.

Discussion

A. Coercive Statements by Wood and Day

The complaint, at paragraphs VII(a) and (b), alleges that, on or about August 30, Wood and Day, both supervisors within the meaning of Section 2(11), violated Section 8(a)(1) by telling employees that the Respondent would be operating as a nonunion shop. It is further alleged that such statements indicated to employees that it would be futile for them to select and/or support the Union as their collective-bargaining representative. The Respondent denied

[26] GC Exh. 6.
[27] GC Exh. 7.

the allegations, including the assertion that Wood and Day acted as supervisors within the meaning of Section 2(11) of the Act.

Section 7 of the Act provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." An employer who interferes with, restrains, or coerces employees in the exercise of such rights violates Section 8(a)(1). The test does not turn on the employer's motive or whether the coercion succeeded or failed but, rather, whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

The parties stipulated at trial that Wood acted as the Respondent's agent and Day acted as a supervisor when the statements were made. Wood was essentially acting as the nursing director, interviewed and recommended the hiring of nursing department staff. Day was, at the time she made the coercive statement, the nursing home's administrator. Although present with counsel throughout the trial, she did not testify.

On at least two occasions while interviewing nursing department staff, Woods asked about their views of the Union. On August 22, Woods asked Foland whether "it be a problem union or non-union." Prior to August 31, Woods told Loveland that the nursing home was "a non-union place" and then asked if that would bother her. Around the same time, Day, the nursing home's new administrator, told Sereno "that there couldn't possibly be a union because it only represents county employees" and that "for private employees it's a different matter."

The statements by Wood and Day conveyed two messages from management. First, the statements strongly imply that the Respondent would look pessimistically upon employee applicants who support the Union. Secondly, they communicated the Respondent's view that it would be futile for employees to support the Union. Under the circumstances, the statements by Wood and Day constituted coercive interrogation. *Bristol Nursing Home,* 338 NLRB 737, 738–739 (2002); *Shamrock Foods Co.,* 337 NLRB 915, 918 (2002); *The Concrete Co.*, 336 NLRB 1311, 1316 (2001); *Godsell Contracting*, 320 NLRB 871, 873 (1996).

B. Section 8(a)(5) and (1)

The General Counsel further alleges that the Respondent, after assuming the management and operation of the nursing home on September 1, violated Section 8(a)(5) and (1) of the Act by making the following unilateral changes without giving the Union notice and opportunity to bargain: (1) eliminated the evening and weekend shift differentials; (2) changed insurance benefits, copayments and premiums; (3) reduced the number of paid holidays from 13 to 7; (4) changed the number and accrual rate of sick days; (5) reduced breaktime from two 15-minute breaks to two 10-minute breaks; (6) eliminated employee seniority; (7) reduced vacation amounts and accrual rates; (8) changed shift and days-off schedules; (9) changed a paid 30-minute meal period to an unpaid meal period; (10) changed the hourly wages of some employees; (11) eliminated personal leave days; (12) eliminated longevity pay; (13) eliminated training pay; (14) eliminated temporary assignment pay; (14) eliminated filling of vacancy and promotional rights; (15) eliminated layoff and recall rights; (16) and eliminated and changed disciplinary procedure and just cause rights. The Respondent concedes that most of these changes occurred when it took over, but asserts that it was free to make such changes as it was

not a "perfectly clear" successor within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

Section 8(a)(5) obligates an employer to bargain with its employees' representative in good faith regarding "wages, hours and other terms and conditions of employment." *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958); *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964). As such, an employer must notify and consult with its employees' chosen union before imposing changes in wages, hours, and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306 (5th Cir. 1992). A successor employer, on the other hand, is usually permitted to set the initial terms and conditions of employment when hiring their employees. An exception applies where it is "perfectly clear" that

> The new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Spruce Up Corp., 209 NLRB 194, 195 (1974), enfd. per curiam, 529 F.2d 516 (4th Cir. 1975). This principle applies even though the successor was, like Grundy County, a public employer. See *JMM Operational Services*, 316 NLRB 6 (1995).

Where a successor employer tends unconditional offers of employment to incumbent employees before announcing significant changes in terms and conditions of employment, thus leading employees to believe that they would be employed on substantially the same basis as before, the "perfectly clear" exception applies. *DuPont Dow Elastomers LLC*, 332 NLRB 1071 (2000), enfd. sub nom. *DuPont Dow Elastomers LLC v. NLRB,* 296 F.3d 495 (6th Cir. 2002). The Board has consistently found that an announcement of new terms will not justify a refusal to bargain if, as in this case, the employer has earlier indicated its intent to retain its predecessor's employees without indicating that employment is conditioned on acceptance of new terms. *DuPont Dow Elastomers LLC*, 332 NLRB at 1074; *Planned Building Services, Inc.*, 330 NLRB 791, 801 (2000); *Canteen Co.*, 317 NLRB 1052, 1052-1053 (1995).

In this case, the Respondent indicated its intent to retain its predecessor's employees without indicating that employment would be conditioned upon their acceptance of new terms. The transfer of the nursing home from a public employer, Grundy County, to the Respondent was a politically sensitive transaction that required reassuring public statements by Borsellino, the Respondent's owner, regarding the future care of the nursing home's residents and the job security of its employees. At the August 22 Grundy County Board meeting, Borsellino stated the Respondent's intention to rehire the overwhelming number of the nursing home's staff, except for a few with absenteeism problems. As a result, the Grundy County Board approved the transfer of the nursing home and a lease agreement to the Respondent on the condition that the Respondent's hiring process defer to the incumbent staff, including senior management and the medical director. Borsellino essentially repeated his remarks during an interview on a local radio show and added that there would be a smooth transition, everything would remain the same, and most staff would be rehired, except for a few employees with absenteeism problems. Indeed, pursuant to its hiring agreement, the Respondent did not place advertisements in the local media until August 31—after nearly all existing staff had been rehired.

It is undisputed that the dietary, maintenance, and activities staff were informed of their wage rates at the time they were hired; none, however, were informed of their fringe benefits. Nursing department employees were interviewed by Woods, but were left in the dark until Minor

told them, as she walked through their units one day near the end of August, that they were hired; Minor did not inform them about the terms and conditions of employment. All employees were informed about their fringe benefits during orientation and nursing department employees were informed of their wage rates when they received their first paycheck 3 weeks later. The fringe benefits package explained at orientation was a change from the terms and conditions set forth in the CBA. None of the rehired employees received a wage reduction and some received higher wage rates.

It is also undisputed that, prior to changing such terms and conditions of employment, the Respondent was aware that existing staff were represented by the Union. On August 29 and 31, the Union notified the Respondent in writing of its position that it was a successor employer, demanded to bargain, and asserted that the Respondent was obliged to maintain the existing terms and conditions of employment. The Respondent recognized the Union, but only after changing the terms and conditions of employment. Under the circumstances, it was perfectly clear at the time employees were hired that the Union's majority status would continue at the nursing home under the Respondent. Thus, the Respondent was obligated to recognize and bargain with the Union prior to changing any of the terms and conditions of employment. *Dow Elastomers LLC*, 332 NLRB at 1075.

Furthermore, because Minor and Day made coercive statements, the Respondent is equitably estopped from unilaterally setting the initial terms and conditions of employment. Woods and Minor made the statements to three CNA's, including Loveland, the former Union president, and Foland, the current Union president, indicating that support for the Union was a futility and possibly harmful to their hiring prospects. These statements came during the critical hiring period that might otherwise have been subjected to protected concerted activity had employees not been subjected to a combination of coercive statements regarding union activity and uncertainty regarding their terms and conditions of employment. Accordingly, the Respondent shall be required to restore the terms and conditions of employment under the CBA until it negotiates a new contract with the Union or negotiates to impasse. *The Concrete Co.*, supra at 1315-1316. See also, *Advanced Stretchforming International,* 323 NLRB 529, 531 (1997), enfd. in part and remanded for further consideration 233 F.3d 1176 (9th Cir. 2000); *U.S. Marine Corp.*, 293 NLRB 669, 672 (1989). To hold otherwise is tantamount to allowing the Respondent to gain from the uncertainty created by its misconduct. See *State Distributing Co.,* 282 NLRB 1048, 1048–1050 (1987).

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees in the Respondent's Morris, Illinois nursing home facility comprised a duly constituted bargaining unit within the meaning of Section 9 of the Act: Included—Licensed Practical Nurse, Certified Nurse Aide or Nurse Aide, Dietary Aide, Cook, Activity Aide, Laundry, Housekeeper, Maintenance Worker, Psych./Soc. Aide, Runner and Support Service Workers; Excluded—Registered Nurse (DON, ADON and Clinical Manager), Social Worker, Kitchen Manager, Office Manager, Office Clerical (Receptionist/Administrative Secretary), Ward Clerk, Volunteer Coordinator, Scheduler, Activity Director, and all other managerial, supervisory, and confidential employees, as defined by the Act.

4. By (1) telling employees or job applicants that it will operate with no union when it was, in fact, obligated to recognize and bargain with the Union for and on behalf of members of the bargaining unit, and (2) asking employees during job interviews about their views of the Union, the Respondent violated Section 8(a)(1) of the Act.

5. By unilaterally changing the wages, benefits, and other terms and conditions of employment for members of the bargaining unit without first bargaining with the Union, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

6. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Morris Healthcare & Rehabilitation Center, LLC, and Prism Healthcare Group, Inc., a single integrated enterprise and/or joint employer, Morris Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees or job applicants that it will operate with no union when it is obligated to recognize and bargain with the Union on behalf of members of the following bargaining unit (bargaining unit employees): Included—Licensed Practical Nurse, Certified Nurse Aide or Nurse Aide, Dietary Aide, Cook, Activity Aide, Laundry, Housekeeper, Maintenance Worker, Psych./Soc. Aide, Runner and Support Service Workers; Excluded—Registered Nurse (DON, ADON and Clinical Manager), Social Worker, Kitchen Manager, Office Manager, Office Clerical (Receptionist/Administrative Secretary), Ward Clerk, Volunteer Coordinator, Scheduler, Activity Director, and all other managerial, supervisory, and confidential employees, as defined by the Act.

(b) Asking job applicants about their views of the Union.

(c) Unilaterally changing the wages, benefits, and other terms and conditions of employment for members of the bargaining unit without first bargaining with the Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) On request, bargain with the Union as the exclusive representative of the bargaining unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

(b) On request by the Union, rescind the unilateral changes in the terms and conditions of employment for the bargaining unit employees that were unilaterally implemented on September 1, 2005, and thereafter.

(c) Make whole the bargaining unit employees for any losses in wages and benefits with interest they may have incurred by virtue of those unilateral changes from September 1, 2005, until such time as the Respondent negotiates in good faith with the Union to agreement or to impasse.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at facility in Morris, Illinois, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and bargaining unit members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 30, 2006

Michael A. Rosas
Administrative Law Judge

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD–36–06
Morris, IL

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL, on request, bargain with the American Federation of State, County and Municipal Employees, Council 31, AFL–CIO, on behalf of AFSCME Local 3903 (Union) and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit (bargaining unit employees):

Included: Licensed Practical Nurse, Certified Nurse Aide or Nurse Aide, Dietary Aide, Cook, Activity Aide, Laundry, Housekeeper, Maintenance Worker, Psych./Soc. Aide, Runner and Support Service Workers. Excluded: Registered Nurse (DON, ADON and Clinical Manager), Social Worker, Kitchen Manager, Office Manager, Office Clerical (Receptionist/Administrative Secretary), Ward Clerk, Volunteer Coordinator, Scheduler, Activity Director, and all other managerial, supervisory, and confidential employees, as defined by the Act.

WE WILL, on request by the Union, rescind the unilateral changes in the terms and conditions of employment for the bargaining unit employees that were unilaterally implemented on September 1, 2005 and thereafter.

WE WILL make whole the bargaining unit employees for any losses in wages and benefits with interest they may have incurred by virtue of those unilateral changes from September 1, 2005, until such time as the Respondent negotiates in good faith with the Union to agreement or to impasse.

WE WILL NOT tell bargaining unit employees or job applicants that we will operate with no union when we are obligated to recognize and bargain with the Union on behalf of members of the following bargaining unit (bargaining unit employees).

WE WILL NOT unilaterally change the terms and conditions of employment of bargaining unit members without notice to and bargaining, upon request, with the Union.

WE WILL NOT in any similar way frustrate your exercise of any rights stated above.

JD–36–06
Morris, IL

MORRIS HEALTHCARE & REHABILITATION CENTER, LLC, AND PRISM HEALTHCARE GROUP, INC.,

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

200 West Adams Street, Suite 800
Chicago, Illinois 60606-5208
Hours: 8:30 a.m. to 5 p.m.
312-353-7570.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 312-353-7170.